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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
*Petitioner,*

v.

ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the rights vested in "members" by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") extend to persons who at one time were, but no longer are, employed within the union's jurisdiction but who have not been formally "expelled" from membership.

2. If so, whether § 501(b) of the LMRDA to that extent violates Article III of the United States Constitution by conferring authority to sue derivatively, on behalf of a union, upon persons who no longer have a personal stake in the outcome of the suit?

3. Whether a district court is required to issue the "good cause" certification that is prerequisite to maintenance of a § 501(b) action even though the court finds that the suit is not in the interest of the union "for whose benefit" the statute declares the suit is to be brought?

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*Respondents*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The United Steelworkers of America, AFL-CIO-CLC, hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *Erkins, et al. v. Bryan, et al. and Steelworkers*, No. 80-7559.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which USWA is affiliated, supports the request for a writ of certiorari. This petition, which is the joint product of USWA and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position only once.

## OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 494 F. Supp. 732 and is reprinted as Appendix C to this petition. The opinion of the same district court on plaintiffs' motion for reconsideration is reported at 494 F.Supp. 737 and is reprinted as App. D. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 663 F.2d 1048 and is reprinted as App. A. The opinion of the court of appeals on rehearing is unreported and is reprinted as App. B.

## JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on December 14, 1981. A timely petition for rehearing was filed and was denied on March 19, 1982 (App. B). On June 4, 1982, Justice White signed an order extending the time for filing a petition for a writ of certiorari to and including July 17, 1982 (App. E), and on July 9, 1982, Justice White signed an order further extending the time for filing a petition for a writ of certiorari to and including August 16, 1982 (App. F). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq., provides in pertinent part as follows:

> § 3. *Definitions* [29 U.S.C. § 402]
>
> For the purposes of this chapter—
>
> (o) 'Member' or 'member in good standing,' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has

been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

§ 501. *Fiduciary responsibility of officers of labor organizations* [29 U.S.C. § 501]

* * * *

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

## STATEMENT OF THE CASE[1]

Plaintiffs (respondents Erkins, Denson, and Culpepper) were employed by the American Buildings Company ("the

[1] This case is before the Court on review of the district court's decision that plaintiffs lacked standing under 29 U.S.C. § 501(b) to prosecute this action. The district court based its decision upon affidavits and exhibits that were submitted by the parties, and the statement of the case that follows is based upon those evidentiary materials. The facts recited herein are undisputed.

Company") at its Eufaula, Alabama plant. Petitioner United Steelworkers of America ("USWA") was the exclusive bargaining representative of the approximately 300 production and maintenance employees at the plant. USWA chartered a local union—Local 7326 ("the Local")—to assist it in performing its duties as the bargaining representative; the employees in the bargaining unit were members of USWA and of Local 7326. The membership of Local 7326 was limited to the employees of the Company's Eufala plant.

On December 3, 1976, upon expiration of its collective bargaining agreement with the Company, USWA commenced a strike against the Company; the strike was authorized by a vote of the membership of Local 7326. The strike continued for over eighteen months, until July 14, 1978, at which time USWA was decertified by the National Labor Relations Board as the bargaining representative for the Company's employees on the basis of an NLRB election among the employees in which a majority voted to no longer be represented by USWA.

Article III of USWA's Constitution limits membership in USWA to persons who are "employed in . . . a[] . . . place within the jurisdiction of the International Union." As a result of the decertification, the employees of the Company ceased to be represented by USWA and automatically ceased being eligible for membership in USWA (and in Local 7326). The employees perforce ceased being obligated to pay dues to USWA and, in fact, ceased paying union dues. USWA did not conduct formal proceedings, however, to expel each individual from the Union.[2]

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[2] In accordance with its standard procedure, USWA did take steps to wind up the affairs of Local 7326. Towards that end, USWA appointed an International representative as administrator of the local. The administrator removed the Local officers from their positions and took control of the Local's assets. Thereafter the Local became dormant.

In December, 1979—seventeen months after USWA was decertified as the bargaining representative for the Company's employees—USWA received a letter from Thomas Jacobson, an attorney who stated he represented a group called the "United Truth Seekers" composed of former employees of the Company. In his letter, Jacobson alleged that during the strike three former officers of the Local and one former member of the Local's negotiating committee had violated their fiduciary duties. Jacobson requested "an accounting of all monies which were in the strike trust fund during the year 1978" [3] and further requested information concerning monies that had been in the Local's own treasury.

In January, 1980, USWA received a second letter from Jacobson on behalf of the "United Truth Seekers." [4] This letter repeated the allegations of the first letter and demanded that USWA file a suit against the alleged wrongdoers to recover "union funds which . . . were misappropriated." The letter further stated that if USWA did not commence such an action within one week, Jacobson's clients intended to do so.

USWA's Associate General Counsel, Carl Frankel, responded to Jacobson's letters. Frankel wrote Jacobson that USWA could not commence an action against the alleged wrongdoers based solely upon the "Truth Seekers'" bald accusations and in the absence of any evidence sup-

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[3] During the course of the strike, USWA, in accordance with its standard procedures, sent monies from its "International Strike and Defense Fund" to the Local. These "strike funds" were placed in a special local strike fund account by the Local and were to be used to aid strikers in need of financial assistance and to pay costs incurred by the Local (or its officers or members) in the conduct of the strike, such as the cost of publicizing the strike or of mounting a boycott of the Company's products. Any assets remaining in the Local's strike fund account at the conclusion of the strike were to be returned to USWA's Strike and Defense Fund.

[4] USWA's response to Jacobson's first letter crossed in the mail with Jacobson's second letter.

porting the allegations. At the same time, Frankel explained to Jacobson that USWA maintains an auditing program to assure that the funds of its local unions are properly managed, and Frankel stated that an audit of Local 7326's affairs would be conducted. Frankel promised that "if our audit turns up any evidence of financial impropriety, or if you should furnish some support for your serious charges of financial wrongdoing, the Union will certainly initiate the appropriate action." [5]

In February, 1980, USWA received another letter from Jacobson. With this letter, Jacobson transmitted an affidavit from Sandra Ward, the wife of the former treasurer of the Local, listing each check that had been written on the Local's strike fund account to the alleged wrongdoers during the month of April, 1978.[6] In his cover letter, Jacobson renewed his demand that USWA initiate suit against the former officers of the Local.

On March 6, 1980, USWA turned the matter (including Jacobson's letters and the Ward affidavit) over to the

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[5] In accordance with the commitments made in Frankel's letter, USWA assigned George Steinbaugh, one of USWA's auditors, to perform an audit of Local 7326. Frankel met with Steinbaugh and instructed him to conduct a full audit of both the local's strike fund account and its general account with a view toward uncovering any improprieties by any former officer of the local.

Frankel later decided that, in light of the seriousness of the charges being made by plaintiffs, it would be preferable to have an outside, public accounting firm conduct the audit. USWA retained the firm of Main, Hurdman & Cranstoun for that purpose. Frankel instructed the firm to follow standard auditing procedures to determine whether each check written to a former Local officer was for a proper or improper purpose.

[6] In her affidavit Ward stated that she had reviewed the cancelled checks for April, 1978 which were sent to her husband by the bank. Ward's affidavit contained no information as to the purposes for which the checks in question were given to the Local officers and thus did not provide a basis for determining whether the checks were issued to reimburse the individuals for legitimate expenses or whether, instead, the checks were issued for improper purposes.

United States Department of Labor ("DOL") for investigation and for any action DOL deemed appropriate (including, if warranted, criminal prosecution of the former officers). USWA pledged its full cooperation to the DOL in its investigation. USWA decided to enlist DOL in the matter for two reasons: first, a DOL investigation would enable an impartial determination of whether wrongdoing had occurred; and second, a DOL investigation would conserve the Union's resources, for if any wrongdoing were found by DOL then USWA would be able to recover all losses under its "Labor Organization Bond" with the United States Fidelity and Guaranty Company. USWA had followed this procedure in at least two prior instances and each time had secured indemnification from the bonding company without the expense of litigation.

On the same day that USWA turned the matter over to DOL, Frankel wrote to Jacobson to inform him of that fact. Frankel again pledged that if any wrongdoing was uncovered "[t]he Union will of course file claims with its bonding company to recover any losses."

On March 21, 1980, Richard Hunsucker, the Acting Director of the Labor-Management Services Administration of DOL, wrote to Frankel acknowledging receipt of the materials Frankel had transmitted. Hunsucker "thank[ed]" Frankel "for bringing this information to our attention" and stated that "the material will be reviewed and appropriate action taken."

On May 1, 1980, while the DOL investigation was pending,[7] plaintiffs commenced this action against the alleged wrongdoers (respondents Bryan, Comer, Greene and Bullard) seeking to recover for the benefit of USWA

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[7] The DOL investigation ended in November, 1981, with the indictment of the former officers of the Local. On February 26, 1982, the defendants were acquitted of all charges following a five-day jury trial.

the money that plaintiffs alleged had been misappropriated. Plaintiffs invoked § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(b) ("LMRDA") which, under certain conditions, authorizes a union member to sue derivatively on behalf of his union to recover union assets that have been diverted.

Because a § 501(b) action may be filed only with "leave of the court obtained upon verified application and for good cause shown," plaintiffs filed a verified complaint and an *ex parte* application seeking leave to proceed.[8] Plaintiffs' papers did not inform the Court that USWA had turned the matter over to DOL for an investigation or that USWA had pledged to file a claim on its bond if any wrongdoing was uncovered. Based on the information before it, the district court granted plaintiffs' application on the same day it was filed.

In June, 1980, USWA filed a motion to intervene for the limited purpose of challenging plaintiffs' right to maintain this action. In support of its challenge USWA made two contentions. First, USWA argued that plaintiffs were not entitled to sue derivatively on USWA's or the Local's behalf under § 501(b) because, as a result of the decertification of USWA as the bargaining representative for the Company's employees, plaintiffs, along with all the other employees, were no longer members of USWA (or of Local 7326) and thus no longer had any interest in the union's recovery of monies. Alternatively, USWA argued that there was not "good cause" for the court to entertain the action since the matter had been turned over to the Department of Labor for an impartial determination of whether any wrongdoing had occurred, and, if wrongdoing was found, USWA had pledged to file a claim with its bonding company to recover any misappropriated funds—a less costly (and more certain)

[8] Section 501(b) expressly authorizes the use of *ex parte* applications.

method than plaintiffs' lawsuit for USWA to recover any misappropriated funds.[9]

On June 30, 1980, the district court issued a Memorandum Opinion in which it sustained the first of USWA's contentions.[10] The court began by noting that its earlier order "illustrates . . . the pitfalls of *ex parte* orders, even in those circumstances where Congress by statute has expressly authorized such orders" (App. 14a). Based upon the full adversarial record that had been developed as a result of USWA's participation, the district court found that plaintiffs "were not members of USW[A] when suit was filed" (App. 19a), and concluded that accordingly they could not maintain this action under § 501(b):

> Plaintiffs concede that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union.[11] * * *
>
> The plaintiffs in the instant suit, therefore, may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he

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[9] Under § 501(b), if plaintiffs were to prove misappropriation and obtain a judgment against the former Local officers, and if these former officers were able to pay the judgment, the court could "allot a reasonable part of the recovery . . . to pay the fees of counsel prosecuting the suit . . . and to compensate [the plaintiffs] for any expenses necessarily paid or incurred by [them] in connection with the litigation." Such an award of fees and expenses would, of course, diminish USWA's recovery. In contrast, if USWA recovered on its bond it would obtain repayment for every penny of any misappropriated funds.

[10] Because it found that plaintiffs were not members, the district court did not reach USWA's second argument, and thus left its initial, *ex parte* finding of "good cause" undisturbed.

[11] The concession to which the court referred was made repeatedly during oral argument before the district court. When plaintiffs later denied that they had conceded that they were no longer members of the Union, the district court quoted three such concessions (App. 26a-27a) in its opinion denying plaintiffs' motion for reconsideration.

> has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. . . . A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW[A] will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise. [App. 18a, 20a]

On plaintiffs' appeal, a panel of the United States Court of Appeals for the Eleventh Circuit reversed. That court, in an opinion by Judge Tuttle, concluded that even though, under the USWA Constitution, plaintiffs no longer were eligible for membership in USWA and no longer were represented by USWA, plaintiffs were still "members" within the meaning of § 3(o) of the LMRDA, 29 U.S.C. § 402(o). The court of appeals reached that conclusion by construing § 3(o) to mean that an individual who at one time qualifies for union membership becomes a member for life unless, thereafter, "one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after 'appropriate proceedings' held pursuant to lawful constitution or bylaw provisions" (App. 7a, quoting and following *Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980)). Since neither event had occurred with respect to plaintiffs, they were still, in the court's view, "members" entitled to institute a § 501(b) action on USWA's behalf (App. 6a).[12] The

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[12] In its opinion as originally issued, the court of appeals had stated:

> The proof before the [district] court at the time of the hearing was that these petitioners *were still employees*, they had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to under-

court of appeals accepted the district court's finding that plaintiffs had no derivative interest in any recovery by the union but concluded that "[i]t is . . . not necessary that the [plaintiffs] in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members [under § 3(o)], the law says they have the standing to conduct litigation" (*Id.*).

After concluding that plaintiffs were entitled to maintain the action, the appellate court turned to the "good cause" issue. The court accepted, at least *arguendo*, USWA's contention that "the way it handled the matter instead of filing suit . . . would have been more beneficial to the Union than to have acted as requested by the members [*i.e.* to have filed suit]" (*Id.* 9a). The court nonetheless ruled that this "cannot establish a want of good cause" (*id.*), explaining that so long as the union has refused to file suit on demand (and so long as plaintiffs' complaint is not otherwise dismissable on its face), "good cause" exists as a matter of law. (*Id.* 9a-11a).

USWA filed a petition for rehearing and suggestion of rehearing *en banc*, challenging the panel's interpretation of the terms "member" and "good cause" and also arguing that, as construed by the panel, § 501(b) violated Article III of the United States Constitution by conferring standing to sue on persons who, in the panel's own words, did not have "any personal stake in the outcome of the litigation." The court of appeals denied rehearing and rehearing *en banc*.

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stand, therefore, how the International can contend that they were not "members" of the Local at the time the suit was filed. [App. 6a-7a; emphasis added]

On rehearing, the court amended its opinion by deleting the underscored words because the court found that that statement "appears not to be supported by the evidence in the record" (App. 13a). The court did not otherwise modify its opinion.

## REASONS FOR GRANTING THE WRIT

This case poses three questions, two statutory and one constitutional, which warrant review by this Court. We demonstrate *infra* at 15-23, that the court below resolved the two statutory questions—concerning the meaning of the terms "member" and "good cause"—contrary to congressional intent; that the court resolved the Article III question in a manner that contravenes the decisions of this Court interpreting that Article; and that viewed simply as questions of law, these three issues merit this Court's attention. Before doing so, however, we first describe the immense practical consequences of the decision below for labor unions and for the federal courts.[13]

### I. IMPORTANCE OF THE ISSUES PRESENTED

A. Virtually every industrial union limits its membership to those who are employed within the union's jurisdiction, *i.e.*, in a workplace that the union represents. Only persons employed in such a workplace are eligible to *join* the union, and eligibility to *remain* a member ceases when that employment ends. Because of the high rate of turnover within workforces, the distressingly large number of permanent plant closings in the current economic climate, and the less-frequent (but not uncommon) decertification of unions, vast numbers of workers move into and then out of the jurisdiction of such unions.

Under the decision below, an individual's membership in a union does not terminate when his employment within the union's jurisdiction terminates, even though the union's constitution so provides. This means that virtually every industrial union still has as "members" vast numbers of persons who are no longer employed within the union's jurisdiction and are no longer represented by the union; for the USWA alone, there are literally hundreds of thousands of such individuals. If

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[13] It is these consequences that have prompted the AFL-CIO to join in this petition.

these individuals are "members" for purposes of the LMRDA, they have the right not only to bring derivative actions on the union's behalf under § 501(b), but, more importantly, to attend union meetings, vote in union elections, and run for union office (*see* §§ 101(a), 401(e), 29 U.S.C. §§ 411(a), 481(e)). Indeed, in three other, recent cases involving the meaning of the term "member" under the LMRDA, individuals who had left the jurisdiction of a union sought to exercise precisely these rights, and in two of the cases the Seventh Circuit held that the individuals were entitled to do so.[14]

The only recourse that the decision below, and the like decisions of the Seventh Circuit, contemplate for a union wishing to exclude from participation in its internal decision-making processes persons no longer employed within the union's jurisdiction is, in the words of the court below, to institute "proceedings . . . looking towards the[] expulsion" from membership of each such individual (App. 9a). Presumably, such proceedings must comport with the requirements of § 101(a)(5) of the LMRDA which states that "no member of any labor organization may be expelled . . . unless such member has been (A) served with written specific charges, (B) given a reasonable time to prepare his defense; (C) "afforded a full and fair hearing."[15] Unions thus would be compelled to

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[14] *Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980) (individuals laid off from their jobs and no longer paying union dues entitled to vote in a union election); *Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213, 216-17 (7th Cir. 1974) (discharged employee held entitled to run for president of union composed exclusively of workers at the plant from which the employee had been discharged). *Contra*, *Taylor v. Great Lakes Seamen's Union*, No. 80-1307 (N.D. Ohio. 1981) (employee who quit his employment held not entitled to vote in union election).

[15] In *Brennan v. Independent Lift Truck Builders Union*, *supra*, 490 F.2d at 217 n.6, the court held that the provision in § 3(o) of the LMRDA that membership may be terminated by expulsion "after appropriate proceedings consistent with lawful provisions of

devote substantial time and resources conducting a massive volume of never-ending proceedings to "expel" from the union persons whose "offense" is simply that they are no longer employed within the union's jurisdiction.

B. The construction given by the court below to the term "good cause" in § 501(b) likewise will have profound practical consequences for unions, and for the federal courts as well. The decision below virtually guarantees that litigation will proceed whenever there is reason to believe a union official has violated his fiduciary duties. For under the decision below, if the union itself does not file a lawsuit in such circumstances, the doors of the federal courts automatically are open to any individual union member to sue in the union's stead—even when the union is pursuing a method of recouping its losses that the court agrees is more efficacious than litigation. For unions, the decision below means that if union funds are misappropriated a union will be unlikely to recover the entire amount of its losses, because in a § 501(b) action—as opposed to, *e.g.*, a proceeding on the surety bond which every union must secure to cover each union official who handles union funds, 29 U.S.C. § 502—the recovery for the union can be diminished by an award of costs and fees to the plaintiff's attorneys. And for the federal courts, the decision below means that their already-overloaded dockets will be burdened by unnecessary § 501(b) actions that disserve the very purpose (protection of union treasuries) for which that section was enacted.

Of course if Congress intended these results, there would be neither cause nor a basis for this Court to intervene. But as we now show, Congress did not so intend, and therefore this Court should grant a writ of certiorari to review the decision below.

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the constitution and bylaws of the union" requires that expulsion procedures comply with § 101(a)(5). This holding was cited with approval in *Alvey v. General Electric*, *supra*, 662 F.2d at 1284, in a passage which the court below quoted and relied upon (App. 7a-8a).

## II. INCORRECTNESS OF THE DECISION BELOW ON THE ISSUES PRESENTED

### A. The Meaning of the Term "Member"

Section 3(o) of the LMRDA, 29 U.S.C. § 402(o), defines "member" as:

> any person [1] who has fulfilled the requirements for membership in [a labor] organization, and [2] who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings.

The court below based its decision on what it termed "the precise language" of this section (App. 7a). The court read that language temporally, to mean that if a person at any time in history "has fulfilled the requirements for membership" in a union that person becomes a member of the union for life, subject only to two conditions subsequent (withdrawal or expulsion/suspension).[16] But this is by no means the only possible reading of the words of § 3(o); it is at least equally possible to read the two clauses of the section to operate simultaneously, so as to provide that to be a union member at a particular point in time one must (1) have fulfilled the requirements for union membership (such as working within the union's jurisdiction or the union's trade) and (2) not have withdrawn or been expelled or suspended from the union. Under this latter reading of § 3(o), the first clause would allow a union to define the class of persons who, at any particular point in time, are eligible for membership in the union, and the second clause would exclude from membership certain persons who fall within that class but who have elected not to be a member or whose membership has been terminated or suspended by

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[16] By the same reading, § 3(o) would provide that once an individual has been "suspended from membership" he forever ceases to be a member, even after the suspension ends. At least one lower court has rejected such a reading as contrary to common sense. *Axelrod v. Stolts*, 264 F.Supp. 536, 540 (E.D. Pa. 1967), *aff'd*, 391 F.2d 549 (3rd Cir. 1968).

the union (following "appropriate proceedings") for other reasons.

While the words of § 3(o) may be susceptible of more than one interpretation, the legislative intent—which is, after all, controlling [17]—is not: Congress intended to preserve, rather than nullify, the right of unions to prescribe and enforce eligibility requirements for obtaining *and retaining* union membership. Congress thus did not intend to confer lifetime membership status, absent "expulsion" proceedings, upon those who were once, but are no longer, employed within the union's jurisdiction.

In the Labor-Management Relations Act of 1947, enacted twelve years before the LMRDA, Congress had expressly guaranteed "the right of a labor organization to prescribe its own rules with respect to the acquisition *and retention* of membership therein." 29 U.S.C. § 158(b)(1)(A). The debates over the LMRDA, which

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[17] As this Court has repeatedly cautioned, most recently last Term in *Steelworkers v. Sadlowski*, 50 U.S.L.W. 4626, 4629 (1982), in interpreting the LMRDA:

> [w]e must look to the objectives Congress sought to achieve, and avoid 'placing great emphasis upon close construction of the words.' *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 & n.6 (1968) (*quoting* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 852 (1960); *Hall v. Cole*, 412 U.S. 1, 11 & n.17 (1973)).

One reason the Court has given for this approach to the LMRDA is that " 'much of the bill was written on the floor of the Senate or House of Representatives' " *Bottle Blowers*, *supra*, 389 U.S. at 468 n.6 and *Hall*, *supra*, 412 U.S. at 11 n.17, *quoting* Cox, *supra*. This is true of § 3(o) which was added to the Senate bill as part of Senator McClellan's amendment by which all of Title I was added to the bill, 2 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1102 (hereinafter cited as "—— Leg. Hist. ——"), and was altered on the floor of the House by the Landrum-Griffin bill which was adopted as a substitute for the entire bill which had been reported out by the House Committee, *id.* at 1045.

in relevant part took place after § 3(o) had been added to the bill, show that—in the words of Representative Landrum, one of the two co-sponsors of the Landrum-Griffin bill that became the LMRDA—Congress did

> not here seek to repeal that. We do not here withdraw or take away from the unions the right to fix their own rules for the acquisition or *retention* of membership. [2 Leg. Hist. 1649; emphasis added]

Representative Griffin, the other co-sponsor of the bill, confirmed that understanding:

> The labor reform legislation . . . does not touch or deal in any way the admission to, or *retention* of, membership in a union. [*Ibid.*; emphasis added][18]

No Senator or Representative expressed a contrary intent, or contrary understanding of the import of § 3(o).

Plainly, then, " 'Congress did not intend section 2(o) to limit the previously recognized right of unions to choose their members,' " *Parish v. Legion*, 450 F.2d 821, 824 (9th Cir. 1971). Accordingly § 3(o) should not be read "wooden[ly]," as the court below did, to define membership "in terms of a given point in time," *Taylor v. Great Lakes Seamen's Union*, No. 80-1307 (N.D. Ohio 1981), and thereby to deny unions the right to treat

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[18] Indeed, so determined was Congress not to intrude upon union autonomy in this area that it even rejected proposals to prohibit racial discrimination by unions in determining their members. Such a proposal was made to the Senate Committee on Labor and Public Welfare by, e.g., Professor Archibald Cox, one of the committee's chief advisors, and by the American Civil Liberties Union; *see* Hearings on Union Financial and Administrative Practices and Procedures, 85th Cong., 2d Sess. 363, 1118 (1958); the Committee, however, did not incorporate this suggestion in the bill it reported out, S.1555, 1 Leg. Hist. 338-96. On the floor of the House, Rep. Adam Clayton Powell introduced an amendment to the Landrum-Griffin bill to prohibit unions from discriminating on grounds of race, religion, color, sex, or national origin in admitting or expelling members, 2 *id.* 1648; the amendment was defeated, 2 *id.* 1651.

those who have left their jurisdictions as no longer members. Rather, the correct interpretation of § 3(o) is the second interpretation set forth above: "as an ongoing condition a Plaintiff must show that he has fulfilled the requirements for membership in such organization." *Id.* The contrary holding of the court below contravenes congressional intent.[19]

This conclusion is confirmed—and the error of the decision below further exposed—by an examination of § 101(a)(5) of the Act. That section governs the procedures that unions must follow in "expel[ling]" members; it would be directly applicable if the court below were correct in its conclusion that the only way a union can remove from "member" status those no longer within its jurisdiction is to "expel" them. Yet it is apparent from the face of § 101(a)(5) that Congress did not intend to require unions to resort to expulsion when an individual leaves the jurisdiction of the union. Rather, § 101(a)(5) was enacted on the understanding that expulsion was a means used only for disciplining for misdeeds those who continued to be within the union's jurisdiction: § 101(a)(5) is entitled "Safeguards against improper disciplinary action"; it applies to proceedings to "fine[], suspend[], expel[], or otherwise discipline[] union members"; and the procedures it requires—for example, notice of "written specific charges" and "a reasonable time to prepare [a] defense"—make sense only in the context of disciplinary proceedings involving those

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[19] The decision below is likewise inconsistent with the philosophy animating the entirety of the LMRDA. As expressed by the Senate Labor and Public Welfare Committee, the Congress that enacted the LMRDA believed that "great care should be taken not to undermine union self-government." 1 *Leg. Hist.* 403. Accordingly, Congress eschewed any regulation which it believed "would weaken rather than strengthen the labor movement" or which "would cross over into the area of trade union licensing and destroy union independence." *Ibid.*

who otherwise qualify for continued union membership.[20] Thus, § 101(a)(5) further demonstrates that, contrary to the decision below, Congress did not intend to require unions to resort to expulsion proceedings merely to terminate the membership status of individuals who have ceased to be employed within a union's jurisdiction.

### B. The Article III Issue

The decision below, by conferring LMRDA membership status—and hence statutory authority to sue derivatively on a union's behalf—on persons, such as plaintiffs, who are no longer within the union's jurisdiction (but have not been formally "expelled" from the union), places the LMRDA in conflict with Article III of the Constitution. The appellate court acknowledged that such persons do not have "any personal stake in the outcome of the litigation," but deemed that of no consequence, reasoning that under the LMRDA "[i]t is . . . not necessary" that plaintiffs have such a "personal stake." Under Article III, however, it *is* necessary for litigants to have a "personal stake in the outcome of the litigation"; indeed, the Article III "standing question" is precisely "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis in original); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). As this Court put it just last Term in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4105 (1982) (citations omitted):

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[20] The legislative history of § 101(a)(5) also shows that the section was intended, in the words of Senator McClellan, the author of the amendment that added all of Title I (including § 101(a)(5)) to the bill, "to protect a man from being arbitrarily disciplined without a fair hearing" 2 Leg. Hist. at 1103; *see also id.* at 1104 (Sen. McClellan); *id.* at 1232 (Sen. Kuchel); *id.* at 1566 (Rep. Griffin).

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' • • •
>
> 'The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.' [21]

This "requirement states a limitation on judicial power." *Id.* at 4106.

> Those who do not possess Art. III standing may not litigate as suitors in the Courts of the United States. Art. III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the framers of the Constitution at Philadelphia in 1787. . . . [*Id.*]

The decision below, by allowing persons without a "personal stake in the outcome" to bring § 501(b) actions, thus ignores Article III's "limitation on judicial power."

### C. The "Good Cause" Issue

Section 501(b) requires a union member wishing to bring an action under that section to obtain "leave of the court . . . for good cause shown." This prerequisite is, as the Second Circuit has observed, "an unusual one"; "[o]rdinarily one needs no permission to litigate under a federal statute." *Dinko v. Wall*, 531 F.2d 68, 74 (2d

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[21] *See also, e.g., Blum v. Yaretsky*, 50 U.S.L.W. 4859, 4[illegible] (1982).

Cir. 1976). The courts have "wrestle[d] inconclusively with the problem of defining good cause." *Id.*

In the instant case, the court below held that even if the union on whose behalf the proposed suit is to be brought is already pursuing the relief that is the object of the proposed suit in a "way more beneficial to the Union" than litigation, the district court is without power to preclude the litigation on the ground that there is not "good cause" for its prosecution. This holding is contrary to congressional intent, and conflicts, in principle, with decisions of other courts of appeals.

1. Section 501(b) expressly declares that actions under this section are to be "for the benefit of the labor organization" to which the plaintiff-member belongs. Given this congressional purpose, it is axiomatic that in determining whether "good cause" exists for a § 501(b) suit, a court must consider whether the proposed action would, if successful, redound to the benefit of the union. Yet the court below precluded that very inquiry, thereby depriving the district court of the power to withhold permission to sue for want of "good cause" even where the court determines that the union is pursuing a more efficacious means than litigation to recover misappropriated funds.

The court justified its conclusion as follows:

> [T]he language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring suit. The trial court could not second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. [App. 9a-10a]

But "the text" of § 501(b) does not "lay down" only *one* precondition to the filing of an action under the section, as the court below seemed to believe; it lays down two, independent, preconditions. The first sentence of § 501(b)

states that an action may be filed only if the union "refuse[s] or fail[s] to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by a[] member of the labor organization." The second sentence adds a second prerequisite: "No such proceeding shall be brought except upon leave of the court . . . *for good cause shown.*" In adding this second prerequisite "Congress must have intended more than that a union member has requested the union to sue and the union has failed to do so." *Dinko v. Wall, supra*, 531 F.2d at 74.

Thus, it is the court below that was guilty of "second guess[ing] the purpose of the statute" by collapsing the two discrete preconditions to a filing of a § 501(b) action into one.[22] And in so doing the court reached a result which is the antithesis of § 501(b)'s purpose: the court authorized § 501(b) actions that actually will drain union resources by reducing (by the amount of the plaintiff's attorneys' fees and costs) the recovery that the union would otherwise receive from the simple alternative—which USWA was pursuing here—of seeking recovery under its fidelity bond.

2. The decision below is inconsistent, in principle, with the decision of the Third Circuit in *Purcell v. Keane*, 406 F.2d 1195 (3rd Cir. 1969). In that case the question was whether, before filing a § 501(b) action, a would-be-plaintiff was required to pursue the alleged wrongdoers through internal union procedures. The court held that such exhaustion of internal union remedies is not an ab-

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[22] Even if the "demand and refusal" prerequisite *were* the only prerequisite to the filing of a § 501(b) action, it would be far from clear that plaintiffs had satisfied it. The statutory language setting forth that prerequisite is in the disjunctive: the union must fail "to sue *or* recover damages *or* secure an accounting *or other appropriate relief*." A number of courts have concluded, however, that Congress actually intended this prerequisite to be met whenever a union fails "to sue [to] recover damages. . . ." *See Dinko v. Wall, supra*, 531 F.2d at 72 & n.4 & cases cited.

solute prerequisite to the filing of a § 501(b) action in every instance, noting that no such absolute requirement is set forth in the statute. But the Third Circuit went on to hold that the failure to exhaust internal union remedies "may affect the 'good cause' requirement," since "[a] court, in its discretion, may . . . take *all* the facts and circumstances into consideration in determining whether 'good cause' has been shown." *Id.* at 1200 (emphasis added).[28] *See also Dinko v. Wall*, *supra*, 531 F.2d at 75 ("'good cause' is an elastic concept"). In contrast, the court below held that certain facts—specifically, the union's pursuit of an alternative to litigation which may be "more beneficial to the Union"—may *not* be taken into consideration in determining whether good cause exists. Thus the decision below cannot be squared with the interpretation of "good cause" announced in *Purcell*.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[28] In *Purcell*, the court found that good cause existed, noting that "the subcommittee appointed [by the union] to investigate the charges . . . was composed of the same individuals who were charged with the misuse of funds." 406 F.2d at 1200.